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CIRCUIT COURT OF THE CITY OF RICHMOND.

PINCHUM'S ADMX. V. SOUTHERN RAILWAY COMPANY ET AL.

March 28, 1904.

DEATH BY WRONGFUL ACT—To whom damages to be paid—Compromise of claim and distribution of recovery—Code, sections 2903, 2904, and 2905.— Where a claim arising out of death due to an alleged wrongful act has been compromised and, pursuant to the provisions of section 2905 of the Code, application has been made to a circuit court for approval of the compromise, and, the parties not agreeing upon the distribution of the proceeds, for an order distributing the same as a jury might direct under section 2903, it is within the discretion of the court whether it will make such direction or will refuse so to do, allowing the recovery to go according to the statute of distributions. In the case at bar, *Held*, that the ends of justice will be met by a refusal so to direct.

Upon a petition of Mary I. Holmes, administratrix of Daniel Pinchum, deceased, under section 2905 of the Code of Virginia.

The facts appear in the opinion.

Bryan and Williams, for the daughter of the decedent, contended that she was the only one of the "enumerated kin" contemplated by the statute, and that accordingly the entire recovery should be awarded her—quoting from *Richmond, Fredericksburg & Potowmac Railroad Company v. Martin's Adm'x*, 9 Virginia Law Register, p. 893, as follows:

"It will be observed that by the express language of the statute the damages awarded cannot become assets in the hands of the administrator, to be disposed of according to law, if the decedent is survived by a wife, husband, parent or child; and the recovery is made free from all debts of the decedent, thus leaving no doubt of the legislative intent to treat the recovery as wholly independent of the decedent and his estate in the event of the survival of any one of the enumerated kin, and making it inure directly and personally to such next of kin by force of the statute, and not derivatively from the decedent, to whom it never belonged either in fact or in contemplation of law."

Robert S. Rives and F. T. Sutton, Jr., for the grandchild.

HON. R. CARTER SCOTT, Judge:

It appears from the record that Daniel Pinchum was during October, 1903, employed as fireman on the Southern Railway, and that on the 19th of said month, while so employed, sustained inju-

ries by reason of the negligence of said company from which he died; that his daughter, Mary I. Holmes, qualified as his administratrix and brought an action against said company in the Circuit Court of Charlotte county; that since the institution of said action the administratrix has agreed upon a compromise with the defendant company, and as provided by law (V. C. 1887, section 2905) has filed her petition in this court for its approval and its further direction as to the manner of distribution of the proceeds of said compromise.

It appears further that Mary I. Holmes is the only surviving child of Daniel Pinchum, but that there is a grandchild now living, a son of Archie Pinchum, named Daniel Pinchum, Jr., now about five years old; that both of his parents are dead and that Daniel Pinchum, Sr., his grandfather, had supported his said grandchild up to the time of his death.

It is contended on the part of the petitioner, Mary I. Holmes, that the whole amount of the compromise, viz: the sum of \$2,500.00, less expenses and reasonable counsel fees, should be directed to be paid to her by operation of the statute, as she is the only child; whereas on the part of the infant grandchild, it is contended that the court should refuse to direct distribution, but allow it go "according to the statute of distributions."

It becomes necessary to determine the meaning of sections 2902-3-4 and 5 of the Code of 1887 as applied to the facts of this case. (Sections 2903 and 2904 have been recently amended. Acts 1904, C. 64, p. 110, approved March 7, 1904). There is no necessity to go into their history. It is admitted that the proceeds must be distributed in accordance therewith, and that this court has no right to enlarge or narrow their plain meaning. Section 2902 provides for the bringing of an action on account of death of a person caused by wrongful act of another. Section 2903 provides by whom and within what time it may be brought and further provides that "the jury . . . shall . . . award such damages . . . not exceeding ten thousand dollars and *may* direct in what proportion they shall be distributed to the wife, husband, parent and child of the deceased. . . .

Section 2904 provides: "The amount . . . shall . . . after the payment of costs and reasonable attorney's fees be paid to the wife, husband, parent and child of the deceased in such pro-

portion as the jury *may have directed, or if they have not directed, according to the statute of distributions*, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so received shall be *assets* in the hands of the personal representative to be disposed of according to law."

Section 2905 provides for the compromise of such claims with the approval of the judge or court wherein the action is allowed by law to be brought, and it is therein further provided: "If the judge approves the compromise and the parties in interest do not agree upon the distribution to be made of what has been or may be received by the personal representative under the said compromise, or if any of them are incapable of making a valid agreement, the judge *may direct such distribution as a jury might direct under section 2903* as to damages awarded by them. In other respects, what is received by the personal representative under the compromise shall be treated as if received by him in an action under the section last named."

What power then has a jury to distribute the proceeds of their verdict? Whatever power the jury has, it must be admitted, the judge or court has, because the statute so provides (section 2905).

Section 2904 provides: "The amount received in any such action shall, after payment of costs and reasonable attorney's fees, be paid to the wife, husband, parent, and child of the deceased in such proportion as the jury may have directed, *or if they have not directed, according to the statute of distributions*, and shall be free from all debts and liabilities of the deceased; but if there be no wife, husband, parent or child, the amount so received shall be '*assets*' in the hands of the personal representative to be disposed of according to law."

The court is of the opinion that this statute means that, upon all the facts presented to a jury, it is clothed with legal power to direct that the whole proceeds should go to only one of those named in the statute, and to determine which one that should be, or else it can divide it between them as the jury deems wisest and best according to the circumstances of the case; or, it can refuse to direct to whom it should go, thinking it best that it should go "according to the statute of distributions" and not as they should direct under the statute. The latter part of this section does not

take away the power given in the preceding section, but only provides that if there be no such persons as are named therein the proceeds shall be "*assets*" in the hands of the personal representative to be disposed of according to law.

Construing the above statutes in the light of the facts of this case, using only the usual courses of construction and taking the words in their ordinary legal signification and meaning, it seems clear to my mind that both the jury and the court have the power to refuse to direct how the proceeds shall be paid, and having refused to so direct the proceeds to go "according to the statute of distributions" (V. C. sec. 2904).

I have carefully examined all the authorities cited in argument and especially *R. F. & P. Ry. Co. v. Martin's Adm'r*, 9 Va. L. R. p. 891, and *Powell's Adm'r v. Powell*, 84 Va. 415, and have taken the pains to examine the records and briefs in each. The first is not in point and the latter, which was decided by the present president of the Supreme Court of Appeals, while he was circuit judge, and on appeal affirmed by President Lewis of the old court, is more in point, but the facts are not similar to those now under consideration.

The court is therefore of opinion that under the facts of this case, the ends of justice will be met by its refusing to direct in what proportion the proceeds shall be paid, but will leave the law to take its course, *i. e.*, that the proceeds of the compromise shall be paid to the administratrix and go *according to the statute of distributions*, and be free from all debts and liabilities of the deceased—and will enter an order to this effect.